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NATIONAL LAW AND INTERNATIONAL ORDER*

By LINDEN A. MANDER

The thesis of the present paper is that the future of law in this country is dependent upon the solution of the problem of international security and that without this solution we must expect to see a progressive decline in the rule of law and a probably unlimited growth at an increasingly rapid rate of official discretionary power with all the dangers to national liberty which such a development would entail. The problem springs from the effect of total war which itself has derived from the application of technological discoveries to war upon an anarchical world society, *i. e.*, a world society lacking in adequate organs of government.

Most national constitutions were drawn up on the assumption that the life of the people of a nation could proceed in security, free from overwhelming danger. The Constitution of the United States, for example, was formed at a time when the major problems requiring detailed constitutional treatment were internal; the conduct of external affairs, both in the diplomatic and the military sphere was left very largely to the executive, with the exception that Congress was designated to be the instrumentality for the declaration of war. The traditional discretion left to the executive in foreign relations was rightly justified on the ground that this agency had access to fuller information by reason of its control over the diplomatic service and was able, when emergency demanded, to take rapid decision. The assumption underlying the whole constitutional structure was that, although war might constitute an occasional danger, and although constant vigilance was necessary to protect national interests, the major part of national existence was assured. It was possible at one and the same time to provide an adequate defense and to have left over sufficient energy and wealth for national welfare and development. (It is true that constitutional lawyers expounded at length on questions which at one time seemed largely theoretical as to how far treaties and executive emergency war powers could in practice modify the normal distribution of powers and individual rights set forth in the Constitution.) That period has ended for the impact of modern war has altered the whole problem of domestic constitutionalism, as the following pages should make clear.

In recent years two outstanding developments in our American domestic law have taken place, first, the growth in power of the federal government relative to state and local governments and second, the

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growth of what is popularly called administrative law or, if one prefers, the administrative process. Many of these developments in both fields can be traced to the complexity of modern economic and social life due to the progressively widening impact and influence of modern industry. What is equally important to emphasize, however, is that much of the movement toward centralization and administrative discretion within nations arises from the spread of international anarchy, by which I mean the situation created in the modern world by a combination of international interdependence and the lack of international agencies to control and channelize the vast energies which modern science has released in an interdependent world.

More specifically, the growth of total war has meant the progressive subordination of economic and social life to the one all-dominating purpose of preserving national existence. In the present struggle for survival many legal safeguards of individual liberty which formerly could be permitted on the assumption that the nation was still essentially safe have had to go overboard. Economic liberties have had to be sacrificed (economics in uniform describes the position of industry in war time) and anyone can think of many instances in which private and corporate injustices have been suffered by reason of the hurried and desperate character of total national organization set-up to avoid total national defeat. What many people fail to see is that government regulation springs from two sources, that due to what might have been normal social and economic complexity and that due to ever-widening military emergency. The same holds true of centralization. Thus we see that the center of gravity of modern nations has changed, and that in addition to threats to legal safeguards arising within nations, there are also threats from without. The lawlessness among nations expressed in the doctrine of national sovereignty (and sovereignty implies the lack of any legal control over the sovereign nation and thus is a doctrine of international anarchy), has increased, and it is, I think, significant that the decline in international law has been paralleled by a growth of personal rule and administrative discretion within the nations themselves. International rules dealing with neutrality, respect for diplomats, treatment of prisoners, treatment of private property, etc., have been ruthlessly discarded; indeed modern war has made neutrality well nigh impossible because powers engaged in total war tend no longer to recognize any distinction between contraband and non-contraband, and neutrality rights therefore must progressively diminish as the area and intensity of war expand. The neutral state therefore must give up a great deal of its international rights or fight for them, and in preparing to defend its rights must arm to the teeth, and in doing so relax the individual liberties and safeguards which are luxuries that can be afforded only when the existence of the nation is clearly unimperilled.

Is there anything abnormal in the decline in respect for international law combined with the mounting tide of personal and administrative government within nations? I think not. The decline of international law measures the growing sense of international insecurity. Governments strike quickly, they rush to grab raw materials, and bring pressure upon neutrals, since they must gain time in an age of blitzkrieg when the initial blow may be well-nigh decisive. They cannot observe the restraint of acknowledged rules. This deterioration in external relations must be paralleled by crisis measures within national boundaries, where every effort must be made to insure the safety of the state which principle then becomes the highest law. Nations feel that they can no longer afford fully to observe either international or domestic law. The dictator countries could more readily arm by first destroying their national constitutions; the democratic countries must organize accordingly.

Who in the present war can separate the necessary arbitrariness of governments for urgent military reasons from the type of executive arbitrariness against which Anglo-Saxon countries have fought for centuries and against which they have erected the careful legal procedures known especially to and valued by the legal profession? If today an objection is raised against some official action, the reply is made that the action is dictated by military necessity. If people suspect that there has been unjustified encroachment or inefficiency in one of the government services they find it difficult to obtain full information because the government will say that the publication of information will be of more value to the enemy than it will be to its own democracy. Who shall judge whether this explanation is true? Thus democracy runs the risk of a progressively diminishing control over its officials; for uncontrolled power is alleged to be necessary to wage war, but uncontrolled power is very difficult to reconcile with the institutions of law which have been so carefully built up over the centuries. One may fairly conclude therefore that in the conduct of the present war lie many dangers to free institutions and that certain bureaucratic top-heaviness and habits may well persist, and that if the growing impact of international affairs upon national affairs continues in a war world we may expect to see an expanding area of official discretion under cover of military necessity or reasons of state. If we are to reverse this tendency we must constitutionalize what has traditionally been called foreign relations, otherwise the constitutionalism of domestic life will be swallowed up in the crisis government resulting from international instability.

The reason is not difficult to find. Unless the problem of international security receives a more adequate solution than it did twenty years ago we shall probably not have an opportunity of resuming many of the safeguards of national law. If we repeat the spectacle of 1919

by defeating our enemies and as a set of victorious allies begin an armaments race among ourselves such a race will from the outset involve total armed preparations, including a huge industrial establishment devoted to the preparation of the industrial products necessary for modern technological war, agricultural organization, and psychological preparation by means of propaganda and indoctrination. We know something now of fifth column methods and in the light of this knowledge we shall be worried as to whether a person advocating low armaments is secretly subsidized by a foreign government or whether he genuinely believes that the future of democracy will require a reduction of armament expenditures. One will not be able to decide whether the critic of the government is a loyal critic or a disloyal one, whether his purpose is to remedy abuses within the government or to discredit the government in the eyes of its own people. I need not cite instances in view of the scores of illustrations afforded during the last ten years. Free and open discussion which constitutes the very lifeblood of the reign of law will be dangerously imperilled.

We may examine the future prospects of law from another angle, namely the position of the President of the United States. He is one and the same time the executive head of the nation, the commander-in-chief of the armed forces and the head of his political party. It is submitted that under present conditions of total war it is becoming increasingly difficult for the President to combine these three functions satisfactorily. We remember the outcry against the Office of War Information on the ground that it was using the President's position as commander-in-chief in such a way as to load the scales in favor of the political party of which the President was head. The truth or untruth of the accusation does not concern us here; what is important to appreciate is that if the world has to face a period of indefinite and deepening crisis, the task of unscrambling the President's position of a three-fold leadership and disentangling the party, executive, and war aspects of that position will be well-nigh impossible.

We already see the effect of war upon the tenure of office of the President. The second term may very properly be defended from the point of view of the crisis; and possibly the third term; but now comes talk of a fourth term, and that may not be the end. Suppose that after the shooting is over the political condition of the world remains ominous, the President of the United States, whoever he might be, would be able to appeal to the danger of swapping horses amid stream. But one cannot ignore the danger that if the stream of international crisis grows wide enough there may be no changing of horses! Is it fantastic to believe that in this way a continuous international crisis might pave the way to a one-party system? I think not. For as hinted above, now that fifth column methods have become the normal procedure in undermining popular confidence, the political party

system could be made a spearhead of a preliminary underground attack upon democracy. Already before this war, serious charges were being made by so-called interventionists and non-interventionists alike; suspicion of motives was growing apace; and even now a number of books are appearing which name important people as being tied to non-democratic organizations. Those familiar with the recent history of Europe have no need to be reminded how the party processes can ultimately be destroyed provided that the internal crisis grows serious enough, and in every case, I think, the national crises in Europe proved to be most intimately connected with the international crisis both of Europe and of the world.

One should not assume that the picture given above will necessarily work out within the next year or two for under the American system Congress has periodically revolted against the Executive. As several writers have pointed out, the separation of powers has tended to result in an alternation of powers and the pendulum has swung with sufficient regularity in the past to justify one in raising the question whether the present congressional revolt against the Executive may not be symptomatic of a significant process in American history. Many measures have been passed by Congress in the last year or so to check the Executive and the administration. With the rightness or wrongness of the action of Congress, we are not here concerned, but one should not overlook the danger that the revolt against the Executive may come at a time when important national decisions relating to foreign policy have to be reached. If Congress, which has traditionally reflected sectional and local interests more than the national interest as a whole, should fall prey to members who in their balanced or excessive zeal against executive and administrative measures may vote blindly or mostly under the influence of particular group interests the catastrophe for this country might assume gigantic proportions. For in the confusion and bitterness the United States might well weaken itself through a renewed dissension over international matters and foreign policy (as in 1919 and 1920) and out of the confusion might well come a deterioration in the position of this country in world affairs. In that case the internal political pendulum would swing again, because the intensity of the international crisis would necessarily lead to a renewed executive control, whatever the party complexion of that executive might be. And it is not difficult to predict that after another period of heightened executive power coinciding with an intensified international crisis (and even war) totalitarian tendencies here would definitely increase. Thus the present Congressional revolt, which perhaps in some matters at least, fails to distinguish between the international causes and the domestic causes of the growth of executive power may have, unless the members develop and maintain a wide vision, disastrous consequences. My point is that in an age of inter-

national crisis it is proving to be, and will continue to be, more difficult to hold the balance between the legislature and the executive under our traditional form of government. This form of government is not primarily suited to a condition of continuing crisis; unless there is a relatively large amount of elbow room, as it were, misunderstanding and friction and inefficiency will result; and war and continued crisis do not permit the "elbow room" to exist.

I wonder if many people appreciate how organization for total war has affected the civil rights of citizens; and yet surely the evidence before us needs no elaboration. The American-born Japanese citizens of the West Coast, many of them loyal beyond question, have been compulsorily shifted from their homes, have suffered economic loss, and face the prospect that, owing to the growth of race prejudice, they may not be permitted to resume their normal life on the West Coast again. We may indeed have created a second class of American citizenship. No one, I think, would deny the military factors involved in shifting the population (though whether the move was undertaken primarily to prevent sabotage or primarily to protect the Japanese themselves may be here left open to question). What has happened to the American Japanese may happen to others, for owing to the ingenious and multifarious methods now possible in total war, every person belonging to a minority group may be a potential enemy and thus those with "double loyalties" may find themselves in a tragic and impossible position. The unfavorable position of our American-born Japanese citizens is directly traceable to the war and so also is the growing tension between negroes and whites. The unduly rapid and extensive movement of population in this country due to war necessities has resulted in tearing up people from their accustomed modes of life, and the race riots in Detroit and New York and the tensions in Seattle bear eloquent witness to the dangers to our internal social structure which are resulting from the strain of war. Is it not a fair judgment that the mounting anti-Semitism, deplorable though it is, springs in large measure from the crisis in world affairs, and is connected with resistance to further Jewish immigration which receives new impetus from the Nazi persecutions in Europe and from heightened emotions in wartime? Evidence exists that a similar and undesirable state of mind threatens to poison the relations between American-born Mexican citizens and other citizens of this country.

The United States comprises one of the most imposing collections of minorities under one government in the history of human kind, but the position of minorities in their civil, cultural, religious, and legal relations tends to become worse because of the need of taking no chances in an age of war and the consequent redoubled surveillance over such minorities. Stern action toward and persecution of minorities, however, seriously affected the spiritual and political unity of

many a country and produced disastrous results as the history of Austria-Hungary and of Turkey has clearly shown. One may conclude, then, that the reign of law is threatened by modern war, not only in the undue growth of the administrative process and the tendency of the Executive and Congress to be increasingly at loggerheads but also by reason of the threat to the very civil rights which it is the function of law to protect.

Nor can the lawyer be indifferent to the alarming growth of crime and the breakdown of traditional restraints which make the enforcement of law within this country a matter of increasing difficulty. The evidence seems clear that the over-rapid social changes required to wage total war are more destructive of traditional restraints than would be a change in international organizations for the purpose of preventing war. At present the evils resulting from bad housing conditions, the moral breakdown due to congestion and the opportunities for exploitation, etc., are immediately felt; the rather remote changes in governmental structure (remote from the average citizen's daily experience) would not touch so immediately his everyday conduct. Many people argue that to effect a change from national sovereignty to international organization would involve vast changes in human behavior. That may be true, but it is submitted that these changes would be on the periphery, as it were, of the individual's private life. True, many symbolic changes ultimately would be necessary, but recent history shows how painlessly much international organization has grown up to meet social needs. The International Postal Union functions in a way which does not infringe upon the consciousness of the average citizens of the member countries. So with the International Copyright Union, the League of Nations Health Organization, etc. Why should we assume that a future amount of international control would unduly disrupt the life of national citizens? It may indeed be hoped that such international control will lessen some of the multifarious federal interferences of today, for many of these interferences have grown out of the necessity of organizing for total war while the amount of international organization required in the event of establishing a genuine United Nations would necessitate far less control over the daily life of citizens. Paradoxical as it may appear, the liberties of the average person and his freedom from excessive regulation would be more guaranteed by a wider framework of world government than under a number of competing national governments each striving to organize itself as completely as possible for total defense or offense as the case might be. What has happened today has been a catastrophic disruption of the element of routine in social life and that disruption must continue unless we can replace competitive armaments with a reasonable degree of cooperation enabling people to get back to a greater degree of leisure and normal living. Can we expect that people's extended efforts can be maintained

for many years more, and can we hope that the restraints necessary for the observance of law can long coexist with the growing nervous tensions which are evident throughout the modern world?

Indeed, no student of law can be blind to the relation between the observance of law and the amount of energy manifested in national life. Weariness of body and soul is a poor foundation on which to build a vital respect for law. Unless there is an alert and active public determined to support the law, statutes will be disregarded and enforcement become lax. Institutions do not perpetuate themselves without the continuing love of and respect for law and a widespread faith in essential justice. The growth of indifference for whatever reason means the shrinkage in the area of effective law, and this is a dangerous phenomenon. Unless concern for justice and law maintains itself at constant pitch, and unless men remain sensitive to the fate of nations as well as of individuals, they tend first to become exclusively national in their sympathies, and then indifferent to the general interests of even their own nation. Hence we have seen that indifference to the plight of minorities abroad has preceded the development of racial intolerance at home. A national isolationism in matters of justice soon leads to regionalism and even personalism in what concerns the rights and liberties of men.

Indifference can arise from over-complexity, and total war, by leading to an immense growth of complexity in modern society, leads also to uncertainty and bewilderment concerning rules and regulations. Today thousands of laymen as well as lawyers are puzzled because of the contradictory nature of many official pronouncements; these contradictory official pronouncements spring in part from the very urgency of policies to be framed and jobs to be done. But if the evil is carried too far a general skepticism results in which the baby is thrown out with the bath. At first respect will be maintained for the outer form of laws but the inner spring of enthusiasm will have declined; what once manifested itself as an eager devotion to principle develops into a laborious observance of appearances, and later even the effort to maintain appearances falters. A tired people cannot have a vital enthusiasm for law and modern civilization stands in grave danger of becoming over-wearied through excessive strain because of international strife and anarchy which in turn affects national morale.

Under these circumstances those less sensitive to the general spirit of the time, those maladjusted people of over-weening ambition or of crude fundamentalist fanaticism have their chance. Their energies are not dissipated by doubts; they see all too clearly the goal set before them in their over-simple vision. It may be the elemental cry of social justice or the appeal to a super-race or merely an exuberant outburst of violence. A tired civilization invites attack from the energetic and ruthless; Madelin has well said that the French Revolution can be

traced to the energy of the lower classes which overthrew the enervated aristocracy. Today we run the same risk, for along with weariness and skepticism which are widely prevalent has come the practice of violence which the last generation has witnessed in intensified form. Almost twenty years ago Professor Bonn in discussing the crisis of European democracy pointed out that parliamentary institutions in the new governments of Europe had to meet the great threat of millions of men returning from the front where they had seen for years all types of horror and destruction. How could these millions settle down to the parliamentary process of settling differences by discussion? Bonn's analysis holds true with even greater force today for, as a recent writer has said, millions of men have tasted the strong meat of violence. And it should be obvious that nations cannot go all out in armed struggle, cannot indulge in hate and propaganda without becoming infected by the very evils which they strive to overcome. Consequently, at the end of the present international hostilities, we may expect to find tempers shorter and willingness to compromise lessened. An historian writing on Byzantium uttered a profound truth when he traced the bitterness of internal politics in Constantinople to the excessive strain placed upon the eastern Roman Empire by centuries of defense against the Arabs and Turks. And we may well anticipate, however much we may deplore, increased political bitterness within this country at the end of the war. If such proves to be the case, the task of national law will be rendered that much more difficult.

An essential element of law consists in the power to make rules that are essential to welfare. Up to now most people have assumed that the sovereign state has the power to make rules for its own peace, happiness, and good government, but such is no longer the case. The foundations of modern world society have broadened so much that the sovereign state no longer has control over many essential conditions which determine its welfare. A few examples will suffice to make the point. Disease has become an international problem. And a great deal of international cooperation has developed out of sheer necessity in order to prevent the introduction of such scourges as typhus, yellow fever, and sleeping sickness into the several countries; germs are no respecters of sovereignty. So in the prevention of crime. The battle against dangerous drugs has had necessarily to be fought by nations combining their forces against ingenious smugglers who could escape through loopholes which separate national policies permitted to remain. And whatever be the legal theory the practical fact remains that in order to protect industrial and artistic property in an age of extensive international trade nations have had to act together.

It is unnecessary at this point to add further illustrations. The general principle which emerges is that national interest and welfare and national sovereignty no longer are synonymous terms. But to hold to a

legal theory which says one thing and to live in a world which embodies another thing involves serious danger, for unless theory and practice are brought into close relation nations may sacrifice their welfare to out-worn theory or engage in practice unilluminated by an accurate appraisal of the principles involved.

If forces which vitally affect the welfare of a nation can and do originate outside the boundaries of that nation, it follows that the distinction between internal and external affairs becomes less true and perhaps even artificial. We now see that the treatment of racial and national minorities in Germany by the Nazis had world-wide consequences; neglect of health precautions in one country may threaten another country with a ruinous epidemic; and civil dissension abroad may form the prelude to international strife as indeed the Spanish civil war formed a prelude to World War II. The depression in the United States had repercussions throughout the world, the collapse of the Credit Anstalt in Austria in 1931 set in motion forces which led to the collapse of international currency stability, and national tariffs have had serious effects upon even far distant lands. In the light of these considerations it becomes obvious that some international agencies are necessary for a systematic consideration of matters which originate in one country and affect the welfare of other countries. If these things are to be dealt with in an orderly way they will require the collaboration of nations; what touches all will be a matter of active concern to all. Thus it would appear that the great task which confronts the modern world is one of constitution building, of ascertaining which agencies can best fulfill the task of effective government. If the reign of law is to extend to these new problems some division of powers will be essential. Some matters will best be regulated by international action; others by national action and still others by state and local action. This does not mean that the divisions at the outset will be hard and fast, for obviously much experimentation will have to be attempted before the world will be in a position to see clearly the best lines of division. Indeed, one may venture the opinion that just as in the United States the simple division of federal and state powers has given away to a much more complicated federal system involving over-lapping of federal, state, and local jurisdictions, so in the world which lies ahead we may expect to find a similar complicated and over-lapping pattern of international governmental structure. Nor should this be surprising since the problems to be solved in the modern world are bewilderingly complex.

Our analysis should make clear the fallacy involved in the argument that a nation had better first solve its domestic problems and then turn to international problems. The sharp division between internal and external exists only in the minds of some people; it does not correspond to fact. Moreover, historically, many reforms have begun

in the international sphere and have come down, as it were, to the national level. When the League of Nations attacked the opium problem it found that its activities were limited by the lack of national agencies of inquiry and enforcement, and before international organization could make much headway against the opium menace it had to persuade national governments to set up appropriate national institutions. Similarly in labor legislation; not a little national and local attempts to improve labor conditions foundered upon the rock of international competition by low-paid labor. Wisconsin's desire to prohibit the manufacture of matches made of white phosphorus had to wait for its fulfillment until an international convention dealing with this problem had been signed. Indeed, within the last twenty years international "legislation" on labor matters has outstripped national achievement and we have the spectacle of standards internationally determined which go beyond what many countries have been able thus far to reach. Many relatively backward countries have owed a good deal to the stimulus and example given through association in international bodies with more advanced countries and as modern life becomes more complex no country can afford to ignore the experience of other countries. International institutions which can bring together this experience can further the national self-interest of the member states.

If rules are to be systematically developed to channelize the productive energy of mankind and to limit the evils resulting from uncoordinated activities or from anti-social action, institutions for making and enforcing and interpreting these rules will be and indeed have become a necessity from the point of view of national self-interest which has now become so entangled with international organization that the two things cannot be kept separate. International organization thus appears, not as an alternative to national well-being but as one of its essential conditions; only with adequate international organizations can we hope for the survival within nations of the rule of law considered both as an instrument for preventing crime and disorder and for promoting justice and social welfare.

It follows that those interested in maintaining and strengthening the rule of law within nations cannot be indifferent to the condition of international law. Elsewhere I have attempted to summarize its weaknesses under the following headings:

1. Scholars disagree as to the nature of international law whether it was true law or not.

2. Some argue that treaties are the expression of the will of a sovereign state while others claim that they are legal obligations. If, however, treaties are "sacred" it must be obvious that nations cannot be unlimited in their sovereignty; if they are unlimited in their sovereignty treaties are merely expression of their temporary convenience. Until the world has made up its mind and ceases to flounder in con-

fusion of thought on this question, we may expect to see a continuance of international anarchy. Talk of auto-limitation and the like merely obscures the problem. Law either is or is not to be observed.

3. International law has recognized the validity of treaties imposed by force and although war can only be ended by a treaty of peace as long as this doctrine holds, *i. e.*, of giving a punitive treaty the effect of law, we are doing little more than legalizing the doctrine "might is right." It will be difficult to escape from the condition into which the world has fallen, for obviously we must start somewhere on the basis of past decisions made as a result of war. If, however, the world can establish a genuine United Nations and make real the doctrine of non-recognition of territorial and other changes made by force, international law will have more closely approximated national law which does not recognize contracts made under duress.

4. Many doctrines in international law have, as Dean Dickinson points out, "outlived their reason;" such rules include the three-mile limit (in some respects), immunity of foreign states from suits in national tribunals, the right of nations to use the high seas unhindered, etc.

5. Another limitation is seen in the question of the so-called justiciable and non-justiciable disputes.

6. Authorities disagree as to how serious are the problems raised by conflicting legal systems throughout the world, a problem which need not be analyzed here.

7. Inadequate institutions for the making of law constitute a serious problem; international conventions have had what some claim to be a quasi or indirect legislative power. But even here the tendency has been for the rule of unanimity to act as an obstacle, although in recent years several exceptions to this rule have been admitted.

8. And above all, the inability of international society to preserve the peace upon which law necessarily rests was its most grave weakness. It would appear, therefore, that if world society is to survive, "International law must either go forward very much or be quite discredited. It cannot remain in its present position containing as it does so many contradictions." These contradictions must be resolved, and new requirements must be met.

"Chief of the new requirements will be the maintenance of order without which all other rules rest upon foundations of sand. The new international authority must have sufficient power, as does the United States government within its borders, to guarantee peace and order.

"But this political power must be used in accordance with rules which can be legitimately described as rules of law. The new international society, if it is to be a genuine society, will have an international law which will closely approximate constitutional law. The constitutions of

the respective states must be geared to the constitution of the larger regional and world unit, so that an infraction of international law or what will be transnational law will at the same time be an infraction of both national law and the new society's fundamental law."¹

To the present writer these conditions appear to be the minimum necessary in the international world to guarantee the maintenance of the reign of law within national states.

¹ LINDEN A. MANDER, *FOUNDATIONS OF MODERN WORLD SOCIETY*, Stanford University Press, 1941, pp. 637-639.